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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK W. R. PRIDE,
Attorney for Petitioner
National Theatres Corporation
100 Broadway
New York 5, New York

JOHN F. CASKEY,
CHARLES F. YOUNG,
STANLEY GODOFSKY,
Of Counsel.

November 19, 1959.



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No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, NATIONAL THEATRES CORPORATION, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered August 24, 1959. The judgment sought to be reviewed had affirmed an order of the United States District Court for the Eastern District of New York denying petitioner's motion for summary judgment. That motion was based on the ground that the action was barred by the New York three-year statute of limitations.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the order of the District Court denying petitioner's motion for summary judgment is reported in 269 F. (2d) 785. The opinion of the District Court is reported in 166 F. Supp. 805. The opinions of the courts below are annexed hereto in the appendix to this petition (*infra*, pages 1-24a).

JURISDICTION

The judgment sought to be reviewed by this petition was dated and entered on August 24, 1959.

The jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28, United States Code.

THE QUESTION PRESENTED

Is the three-year New York statute of limitations, Section 49(3) of the New York Civil Practice Act, applicable to a private right antitrust action for treble damages brought in a federal court in New York prior to the effective date of the federal four-year statute of limitations?

THE STATUTES INVOLVED

The pertinent statutes are Section 4 of the Clayton Act, 15 U. S. Code § 15, Sections 49(3) and 48(2) of the New York Civil Practice Act and Section 205-a of the New York General Municipal Law, the texts of which are set out in the appendix to this petition (*infra*, pages 25-26a).

STATEMENT OF THE CASE

Plaintiff, respondent here, commenced this action under the antitrust laws in the United States District Court for the Eastern District of New York on September 5, 1951. Jurisdiction in the District Court was conferred by Sections 4 and 12 of the Clayton Act, 15 U. S. Code §§ 15, 22.

Plaintiff alleged that it was injured in its business and property of operating the Tower theatre in Los Angeles, California, by reason of the acts of the petitioner and others not named as defendants. The complaint alleges that plaintiff

operated the Tower theatre until July 4, 1935. It is conceded that plaintiff's cause of action accrued in California no later than that date. Plaintiff's alleged cause of action thus arose more than sixteen years prior to the institution of its action.

Petitioner is the only defendant, although a number of other companies against which the statute of limitations had clearly run, including a number of petitioner's California subsidiaries, were named as co-conspirators.

Section 13 of the New York Civil Practice Act provides that a plaintiff's cause of action is barred in New York if it is barred either by the statute of limitations of the state in which the cause of action arose, here California, or by the applicable statute of limitations of the State of New York.

It is conceded that the statute of limitations barred the suit as to the petitioner if it could have been sued in California during the three years after the cause of action accrued on July 4, 1935.

To escape the bar of the California statute of limitations, plaintiff contended that the running of the California statute was tolled (1) for the period from July 4, 1935, to July 20, 1938, under Section 351 of the California Code of Civil Procedure by petitioner's alleged absence from California, and (2) for the period subsequent to July 20, 1938, by the pendency of *United States* v. *Paramount Pictures Inc., et al.*, Equity No. 87-273, Southern District of New York.

With respect to the running of the New York statute of limitations, plaintiff contended that the applicable New York statute was the six-year provision of Section 48(2) of the New York Civil Practice Act, and that the New York statute of limitations was tolled (1) for the period from July 4, 1935, to July 20, 1938, under Section 19 of the New York Civil Practice Act by petitioner's alleged absence from New York, and (2) for the period subsequent to July 20, 1938, by the pendency of *United States* v. *Paramount Pictures*, referred to above.

On plaintiff's motion, a separate trial of petitioner's statute of limitations defenses was ordered on July 25, 1954. District Judge Rayfiel of the Eastern District of New York ordered that the trial be held before the court without a jury since the issue was purely legal in its nature, that is, whether petitioner could have been sued in California or in New York under Sections 4 and 12 of the Clayton Act, or Section 7 of the Sherman Act.

A trial on that issue was held on December 12-16, 1955, before District Judge Clarence G. Galston*. On March 28, 1956, Judge Galston rendered his decision, in which he held that the petitioner had been amenable to suit in California and New York throughout the period from July 4, 1935, to July 20, 1938, and dismissed the complaint here as barred by the California statute of limitations (140 F. Supp. 909). Judge Galston did not rely on the New York statute of limitations as a ground for dismissal, because the authorities then indicated that the applicable New York statute of limitations was six years. Petitioner so advised Judge Galston.

Since Judge Galston had held that the action was barred by the California statute of limitations, it was not necessary for Judge Galston or counsel to concern themselves with the issue of the applicable New York statute. In the companion *Gumbiner Theatrical Enterprises, Inc.* case, wherein the cause of action accrued on December 28, 1931, however, Judge Galston also held that petitioner was present in New York from July 8, 1931; to at least July 20, 1938, inclusive, and that the New York six-year statute, as well as the California

*Two cases were tried together before Judge Galston on the statute of limitations issue. Plaintiff in the first case was Gumbiner Theatrical Enterprises, Inc., and in the second the respondent here, Bertha Building Corporation. Petitioner National Theatres Corporation was the only defendant in each case. The cause of action in the *Gumbiner Theatrical Enterprises, Inc.* case, however, accrued in California on December 8, 1931. One H. L. Gumbiner owned all the stock of both plaintiffs.

three-year statute, barred the *Gumbiner Theatrical* claim. With the filing of his opinion, Judge Galston also filed extensive findings of fact and conclusions of law with respect to petitioner's business activities in both California and New York.

On appeal, the Court of Appeals for the Second Circuit held that plaintiff was entitled to a jury trial of the issue whether petitioner could have been sued in California from July 4, 1935, to July 20, 1938. Accordingly, it reversed the judgments of dismissal and remanded both this case and the *Gumbiner Theatrical* case to the Eastern District of New York for a jury trial of that issue (248 F. (2d) 833, 836). The Court of Appeals, however, granted a re-hearing and on the re-hearing in the *Gumbiner Theatrical* case held that the evidence with respect to petitioner's business activities in New York were such that even in a jury trial petitioner would have been entitled to a directed verdict that petitioner was subject to suit in New York. In that case the New York statute of limitations had not been tolled. The court, therefore, affirmed the judgment of dismissal in the *Gumbiner Theatrical* case and remanded the case at bar to the Eastern District of New York for a trial of the issues raised by the statute of limitations defense (248 F. (2d) 833, 840-42). Petitioner did not urge upon the re-hearing the issue whether the New York three-year statute of limitations was applicable and the Court of Appeals on the re-hearing had no occasion to reach that issue. The effect of that decision was to establish as a matter of law that for at least six years prior to July 20, 1938, petitioner had been present, transacting business and was subject to suit in New York.

The state of the law regarding the applicable New York statute of limitations to antitrust cases at the time of the trial on the limitations issue and at the time of the first proceeding in the Court of Appeals was reflected in the decision by District Judge Ryan in the Southern District of New York in 1953 in *Leonia Amusement Corp.* v. *Loew's, Inc.*, 117 F. Supp.

747. Judge Ryan there held that the applicable statute of limitations in an antitrust action brought in New York was the six-year New York statute as contained in Section 48(2) of the New York Civil Practice Act. After the conclusion of the first appeal in this case in the Court of Appeals, that is, on December 12, 1957, District Judge Levet, also sitting in the Southern District, held in *Banana Distributors* v. *United Fruit Company*, 158 F. Supp. 160, that the three-year New York statute of limitations, Section 49(3) of the Civil Practice Act, was the applicable statute of limitations in antitrust cases brought in New York. Judge Levet refused to follow Judge Ryan's earlier opinion in the *Leonia Amusement* case.

Also, after the original trial and the appeal in this case, two of the Courts of Appeal had reflected a definite trend toward holding that a shorter penal statute of limitations should be applied to actions which contain a mandatory trebling provision.* The Third Circuit held that the applicable New Jersey statute in treble damage actions is the two-year penalty statute of that state. The New Jersey statute, Section 2A-14-10 of the New Jersey Revised Statutes, is substantially the same as the three-year New York penalty statute. *Gordon* v. *Loew's Incorporated*, 247 F. (2d) 451 (3rd Cir. 1957).** The Seventh Circuit, in *Grengs* v. *Twentieth Century-Fox Film Corporation*, 232 F. (2d) 325 (7th Cir. 1956), *cert. den.* 352 U. S. 871, likewise held that the two-year penalty statute of Wisconsin applied to antitrust actions brought in that state. That statute is virtually the same as the New York three-year statute.

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*Those decisions were plainly presaged in a number of decisions by this Court and the Courts of Appeal dealing with the antitrust laws in settings other than one dealing with statute of limitations questions. Those decisions are considered below at pages 17-19.

**See also *Dean Oil Company* v. *American Oil Company*, 254 F. (2d) 816 (3rd Cir. 1958), *cert. den.* 358 U. S. 835, and *Carlton Lamp Corporation* v. *General Electric Company*, 254 F. (2d) 815 (3rd Cir. 1958), two cases in which the Third Circuit adhered to its earlier decision in *Gordon* v. *Loew's*.

Plainly, there had been a change in the law which was not available to petitioner at the trial of the limitations issue. Accordingly, when the case was remanded to the District Court for a jury trial on the question whether petitioner could have been sued in California for the three years preceding July 20, 1938, petitioner filed its motion for summary judgment dismissing the complaint as barred by the three-year New York statute of limitations.

Without reaching the issue of law raised by the motion to dismiss, District Judge Zavatt denied petitioner's motion on the theory that petitioner was precluded from relying upon the New York three-year statute by the doctrine of "the law of the case." Leave to appeal was granted under the Interlocutory Appeals Act, 28 U. S. C. §1292(b).

On appeal, the Court of Appeals held that the question whether the New York three- or six-year statute of limitations applied had not been decided by Judge Galston on the first trial and that the law of the case did not bar petitioner from raising that issue. *Dictograph Products Company* v. *Sonotone Corporation*, 230 F. (2d) 131 (2nd Cir. 1956). The Court of Appeals further held that petitioner was not precluded by waiver or estoppel from contending that the three-year statute of limitations was applicable.

On the statute of limitations question, however, the court held that the six-year statute applied to plaintiff's cause of action. The court recognized the well-settled rule that the relevant New York statutes were to be construed and interpreted by the federal courts as those statutes would be construed and interpreted by the New York courts. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390; *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.*, 191 F. (2d) 912 (7th Cir. 1951), *cert. den.* 342 U. S. 947; and *Gordon* v. *Loew's Incorporated*, *supra*. The court held that if the issue had been presented to the New York Court of Appeals, that court would have applied the six-year statute.

The decision below was based solely upon the decision of the New York Court of Appeals in *Sicolo* v. *Prudential Sav. Bank*, 5 N. Y. (2d) 254 (March 5, 1959), a case decided after Judge Levet's decision in *Banana Distributors* v. *United Fruit Company, supra*, and after the effective date of the federal statute of limitations. The court below held that the *Sicolo* decision "makes it plain that *Leonia* correctly anticipated the trend of New York law". (Appendix, p. 7a). In effect it was held that the New York Court of Appeals would not regard an action for multiple damages as an action for a penalty within the meaning of Section 49(3). Hence, it was held, the six-year provision of Section 48(2) applied in this case.

REASONS FOR GRANTING THE WRIT

In holding that a treble damage action under the antitrust laws was not an action for a penalty within the meaning of the New York three-year statute of limitations, the court below has decided an important question of New York law in a way conflicting with applicable state law. As we shall demonstrate, most persuasive grounds exist for review by this Court under the Court's Revised Rule 19 (1)(b). In reaching its decision the court below misconceived and misapplied the decision of the New York Court of Appeals in *Sicolo* v. *Prudential Sav. Bank, supra*. It was manifest error to hold that the New York Court of Appeals would equate a penalty statute such as the federal antitrust laws with a compensatory statute such as Section 205-a of the New York General Municipal Law, the statute involved in the *Sicolo* case (see Appendix, pages 25-26a). The decision in *Sicolo*, in fact, turned entirely upon an interpretation of Section 205-a by the New York Court of Appeals.

In that case Sicolo, a former member of the New York City Fire Department, had been injured on December 23,

1951, while fighting a fire in the Prudential Savings Bank building. More than four years after the accident, Sicolo filed an amended complaint in which he set out a cause of action under Section 205-a of the General Municipal Law. That statute provides, in substance, that for injuries sustained as a result of a property owner's negligence in failing to comply with the requirements of the law an injured fireman is entitled to recover his actual damages but in no event less than $1,000, regardless of actual loss. Defendant moved to dismiss the action because the amended complaint was not filed within three years of the date of the accident. The Appellate Division dismissed the complaint but the Court of Appeals held that the action was not one for a penalty. The six-year statute was held to apply.

The court below construed the *Sicolo* case as holding that in New York all multiple damage actions for civil damages fall within the New York six-year statute of limitations, saying that "the New York Court of Appeals does not regard actions for civil damages which are made exemplary in part only" [Appendix, p. 8a] as falling within the three-year statute. That, however, is not the holding in the *Sicolo* case. To the contrary, the decision of the New York Court of Appeals in *Sicolo* draws and points up a distinction which has been consistently applied by the New York courts between a remedial action for compensatory damages and one for penal damages. As plainly appears from the *Sicolo* decision, the test whether a particular liability created by statute falls within the three-year New York "penalty" statute of limitations or within the New York six-year non-penalty statute turns upon the question whether the particular statute creating the liability was enacted primarily as punishment for an infraction of law or whether it was enacted for the purpose of redressing injury to the individual. That was the test which the court applied in *Sicolo*. It is the test which the court below should have applied in this case.

Section 205-a of the General Municipal Law gives an injured fireman the right to sue for damages actually sustained in fighting a fire caused by a defendant's violation of law [in the *Sicolo* case, the New York City Administrative Code]. If, however, it is not possible to ascertain the amount of the fireman's damages, or if his injury is of a minor nature, the fireman is allowed a minimum recovery of $1,000.* It seems plain that the primary purpose of that statute is not penal—i.e., the statute was not enacted primarily for the punishment of wrongdoing, but, rather, to insure that an injured public servant should receive some compensation whenever he could establish the fact of injury but not the exact amount thereof. The statute provides for actual damages and only actual damages wherever they are in excess of the minimum compensation of $1,000. Sicolo himself sued for $100,000 for his actual injuries.

In *Cramer* v. *Niccitelli*, 2 Misc. (2d) 508 (Sup. Ct., Westchester Co., 1956), the court said of that statute (p. 510):

> "It seems clear from a reading of the entire section 205-a that the predominant purpose of that enactment was not punishment of the person who failed to comply with the aforesaid statutes, ordinances, etc., but was to afford additional compensation to the fireman who was injured or to the family of the fireman who was killed. In the light of such purpose, this court holds that the statute is not penal in nature (cf. *Cox* v. *Lykes Bros.*, 237 N. Y. 376)."

As to that aspect of the statute, following its well-established rule that the essential nature of the action must be looked to in determining which statute of limitations to apply,**

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*For loss of life a minimum recovery of $5,000 is authorized. Such statutes have never been regarded as penal in New York.

**Potter v. Walker, 276 N. Y. 15; Brick v. Cohn-Hall-Marx Co., 276 N. Y. 259.

the New York Court of Appeals in *Sicolo* said (5 N. Y. (2d) 254, 258):

> "It is the intrinsic nature of the exaction that counts and a section 205-a suit is essentially one for compensation to a person injured through a defendant's fault. The successful plaintiff is awarded his proven damages with a minimum recovery of $1,000."

The test which the New York courts apply in determining "the intrinsic nature of the exaction" is set forth in the *Sicolo* case, as follows (p. 258):

> "The words 'penalty or forefeiture' when used in a Statute of Limitations refer to something imposed in a punitive way for an infraction of a public law and do not include a liability created for the purpose of redressing a private injury, even though the wrongful act be a public wrong and punishable as such (*Meeker* v. *Lehigh Val. R. R. Co.*, 236 U. S. 412, 423)."

It is clear from a reading of the *Sicolo* case that if the New York Court of Appeals were required to determine whether a treble damage action under the antitrust laws is governed by the three year provisions of Section 49(3) of the New York Civil Practice Act, it would decide that question by determining whether the statute was enacted for the purpose of imposing punishment for a violation of public law (even though providing redress to the injured party as well) or whether it was enacted primarily for the purpose of redressing a private injury.

The court below did not even purport to apply that test. Instead, it necessarily held that for statute of limitations purposes all multiple damage actions are non-penal under New York state law. In so holding, the court below not only misconstrued the *Sicolo* case but ignored a substantial body of New York law which holds to the contrary. Those decisions are to the effect that where a multiple damage action is enacted for the purpose of imposing punishment upon the wrongdoer it

is an action for a penalty even where, as in the case of a treble damage action under the federal antitrust laws, the award of damages to the person aggrieved also redresses an injury sustained by an individual.

We review briefly these New York decisions.

An action for treble damages for forcible entry and detainer was enacted by New York in 1788 (Laws of 1788, c. VI), and a similar statute has been in effect ever since. Forcible entry and detainer is now a misdemeanor under Section 2034 of the New York Penal Law and the person aggrieved is given an action for treble damages by Section 535 of the New York Real Property Law. Thus, as under the Sherman Act, the same conduct constitutes both a crime and a cause of action for treble damages. The purpose of treble damages for forcible entry and detainer is to deter resort to violence. Such was the holding in *Fults* v. *Munro*, 202 N. Y. 34, 39-42, which was an appeal by the plaintiff from the affirmance of a judgment for the defendant on a non-suit in a treble damage action for forcible entry under Section 1669 of the Code of Civil Procedure,* the predecessor of Section 535 of the Real Property Law. The non-suit was reversed on the facts, the court saying (p. 41):

> "The civil action to recover treble damages is penal in nature and its object is to redress the forcible and wanton violation of the right to the possession of real estate."

Hallock v. *N. Y. C. & H. R. R. R. Co.*, 202 N. Y. 201, was also an action under Section 1669 in which plaintiff

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*Section 1669 of the New York Code of Civil Procedure reads as follows:

> "If a person is disseized, ejected, or put out of real property, . . . he is entitled to recover treble damages, in an action therefor against the wrong-doer."

In its penalty provisions this statute is virtually identical with Section 4 of the Clayton Act.

recovered treble damages. In reversing because the facts did not bring the action within Section 1669, the Court of Appeals said (p. 202):

> "The action is at law and the plaintiff's right to any recovery must depend upon proof of facts, which will bring the case within statutory provisions, that are penal in their nature."

And further (p. 204):

> "Because of the breach of the peace, in a disorderly trespass upon the land, damages are given punitively."

In *Marchand* v. *Haber*, 16 Misc. 319 (Sup. Ct., N. Y. Co., 1896), the trial term of the Supreme Court awarded plaintiff damages of $250 for having been dispossessed from real estate. Plaintiff then moved in the same court for judgment for treble that amount under Section 1669 of the Code of Civil Procedure. This proceeding is separately reported, *Marchand* v. *Haber*, 16 Misc. 322 (Sup. Ct., N. Y. Co., 1896). The court held that the manner of dispossession did not warrant such an award, saying (p. 322):

> ". . . the statute is to be interpreted as a penal one, and the facts disclosed do not bring the case within its spirit or intent."

In *Billig* v. *Nelson Properties, Inc.*, 166 Misc. 301 (Mun. Ct., Borough of Bronx, 1938), the trial court refused to grant treble damages for forcible entry because of a finding that the entry had not involved force. In speaking of the treble damage action, however, the court said (p. 304):

> "The Legislature has thus *penalized* one who resorts to force in order to obtain possession of real property peacefully occupied by another. [citation] No such *penalty* has been provided by statute for surreptitious trespass as distinguished from forcible ejection." [Emphasis supplied.]

The Laws of 1788 also gave a landlord an action for double rent against a tenant holding over after having given notice to quit. This law is continued as Section 229 of the New York Real Property Law. In *Lerner* v. *Wolf*, 121 Misc. 114 (App. Term, 1st Dep't, 1923), the court, in affirming a judgment for a tenant in an action for double rent, said (p. 116):

> "It will be observed, on reference to the Real Property Law, that section 229 provides *the penalty of double rent* against a tenant who gives notice of his intention to quit and does not thereafter do so. Section 230 provides *a similar penalty*. * * *." [Emphasis supplied.]

Regan v. *Fosdick*, 19 Misc. 489 (App. Term, 1st Dep't, 1897), was an appeal from a City Court judgment for a landlord for double rent against a tenant who had held over. The tenant had not vacated because he had been quarantined by the Health Department. The Supreme Court reversed because it believed that the quarantine excused the tenant from the liability for double rent. In its opinion the court quoted the trial court as having made the following statement (p. 496):

> "The defendant justifies the holding over under authority and compulsion of the board of health, which I say is not sufficient and does not release him from *the penalty provided for by the statute*." [Emphasis supplied.]

Statutes giving double rent for holding over "are penal in nature, to be strictly construed, and not to be extended beyond their terms and the evil intended to be remedied thereby." 32 Am. Jur., Landlord and Tenant, § 932.

Numerous New York statutes have allowed multiple recoveries for moneys lost on gambling or risked in lotteries. Such laws are intended primarily to correct a public wrong as distinguished from vindicating a purely private wrong. Where actions have been brought to recover double the amount paid

for lottery tickets, such actions have been deemed actions for a penalty.

Roediger v. *Simmons*, 14 Abb. Prac. (N. S.) 256 (1872), was such an action to recover double the amount paid for lottery tickets. The court said that the action "seeks the recovery of a sum of money, in the nature of a penalty" (p. 258).

In *Wilkinson* v. *Gill*, 74 N. Y. 63, another action brought under the statute against lotteries, the question whether the action was for a penalty in the sense of any New York statute using the term "penalty" did not arise. But the Court of Appeals in *People* v. *Hines*, 284 N. Y. 93, said at page 102 that *Wilkinson* v. *Gill* "was a civil action for the recovery of a penalty under a statute permitting such recovery by 'any person who shall purchase * * * ticket * * * in any portion of any illegal lottery.'"

In *Garson* v. *Backer*, 181 Misc. 342 (Sup. Ct., Queens Co., 1943), plaintiff sued for double damages and double costs as provided in Section 1383 of the Penal Law. Plaintiff alleged that defendant, publisher of The New York Post, was running a lottery in the Post. In holding that the action was to recover a penalty and should be tried in the county where the cause of action arose, the court relied upon *People* v. *Hines*, *supra*, and *Wilkinson* v. *Gill*, *supra*.

Warren v. *Doolittle*, 5 Cowen 678 (Court of Errors, 1825), was an action for debt under the 14th section of the Statute of 1813, concerning distresses, rents and the renewal of leases (4 R. L. 437-8). The statute allowed recovery for double the value of goods which had been removed from leased premises with the intent to defraud the landlord. The jury found for plaintiff in the amount of $29.00 and the Court of Common Pleas entered judgment for $58.00, double the value found by the jury, and costs. In affirming the judgment, Chancellor Sanford referred to the Act as imposing a penalty. In his concurring opinion, Senator Colden said (p. 686):

> "The plaintiffs below do not recover more than they have demanded. In actions for penalties, where they depend on uncertain values, the plaintiff may recover less than he counts for. The rule, that in an action of debt, a plaintiff must recover according to his count, has been relaxed in a thousand instances, as in *M'Quillin* v. *Cox*, (1 H. Bl. 149); and if the old rule were still adhered to, in actions of this nature, it would render all penal statutes nugatory, which provide that value shall be the measure of a penalty. It would be equally absurd to say that a party must, at his peril, fix the value at neither more nor less; than a jury may think right. If this were required, it is hardly possible that a penalty of this nature could ever be recovered."

We agree, as pointed out by the court in the *Sicolo* case, that not all multiple damage actions are for a penalty. In discussing this aspect of New York law, the Court of Appeals in *Sicolo* said (p. 258):

> "That the recovery may exceed in some instances the actual loss does not make the liability truly penal in nature, any more than it did in *Cox* v. *Lykes Bros.* (237 N. Y. 376 [suit on a statute giving a seaman two days' pay for each day's wages withheld]). Doubling the amount of workmen's compensation (Workmen's Compensation Law, § 14-a) is held not to be the imposition of a penalty (*Bogartz* v. *Astor*, 293 N. Y. 563; *Matter of Sackolwitz* v. *Hamburg & Co.*, 295 N. Y. 264). Similar holdings have been made as to the limitations applicable to suits for overtime, attorney's fees, etc., under the Federal Fair Labor Standards Act (*Walsh* v. *515 Madison Ave. Corp.*, 293 N. Y. 826; *Asselta* v. *149 Madison Ave. Corp.*, 65 F. Supp. 385, affd. 156 F. 2d 139, affd. 331 U. S. 199). In each of these cited decisions the courts ruled out 'penalty' by applying the true test of whether impressed for punishment or for redress of injury to an individual."

From the foregoing, it is readily apparent that the test which should have been applied by the court below was

whether the remedy of treble damages in the Clayton Act was enacted primarily for punishment of the wrongdoer or, on the other hand, was enacted primarily as redress of injuries sustained by the individual. It is clear, both on reason and authority, that the primary purpose of that provision in the Clayton Act was punishment of the wrongdoer and not compensation for injury sustained by the individual.

If compensation had been the primary purpose of the statute, it would not have been necessary or desirable to provide for a mandatory trebling of the amount of actual damages sustained. It is plain that Section 4 of the Clayton Act was enacted primarily as an additional penalty, a punitive sanction, to deter potential violators of the antitrust laws. In Section 4 we have precisely the type of statute that is "imposed in a punitive way for an infraction of a public law" (*Sicolo* at p. 258).

The legislative history of the antitrust laws illustrates beyond doubt that Congress intended the treble damage feature in private actions to operate primarily as a punitive sanction and as an aid to the enforcement of the Act. See 21 Cong. Rec. 3146-47, 3150 (51st Cong. 1st. Sess.).

This Court in *United States* v. *Borden Co.*, 347 U. S. 514 recognized the function of the trebling provision, saying (p. 518):

> "The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws. . . ."

In *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, this Court again states in plain words that the recovery in antitrust treble damage actions was exacted as punishment. In that case it was said (p. 431):

> "Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers

have complete dominion. The mere fact that *the payments were extracted from the wrongdoers as punishment* for unlawful conduct cannot detract from their character as taxable income to the recipients. Respondents concede, as they must, that the recoveries are taxable to the extent that they compensate for damages actually incurred. It would be an anomaly that could not be justified in the absence of clear congressional intent to say that a recovery for actual damages is taxable but not *the additional amount extracted as punishment* for the same conduct which caused the injury." [Emphasis supplied.]

Again, in *Lawlor* v. *National Screen Service*, 349 U. S. 322, this Court spoke of (p. 329):

> ". . . the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action."

In *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. (2d) 358 (9th Cir. 1955), the court said (p. 365):

> "The treble damage action is a sanction allowed to a private litigant, because of the public interest."

And in *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. (2d) 891 (5th Cir. 1954), *cert. den.*, 348 U. S. 912, the court said (p. 893):

> "The main purpose of those laws was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose. Glenn Coal Co. v. Dickinson Fuel Co., 4 Cir., 72 F. 2d 885, 889. *The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which would help enforce the antitrust laws* and therefore make them more effective. Maltz v. Sax, 7 Cir., 134 F. 2d 2, 4. The very foundation of the right of a private suitor to recover threefold the damages by him sus-

> tained, and the cost of suit, including a reasonable attorney's fee' is the violation of public rights prohibited by the Act and, indeed, made criminal offenses." [Emphasis supplied.]

See also *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, 29; *United States ex. rel. Marcus* v. *Hess*, 317 U. S. 537, 550, 556.

The decision of this Court in *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, is not to the contrary.

In the court below, plaintiff contended that the holding in *Chattanooga Foundry* that the Federal and Tennessee "penalty" statutes of limitations were inapplicable to a private treble damage action precluded the application of the New York "penalty" statute. The Court of Appeals disposed of plaintiff's contentions with respect to the Federal statute in the following language (Appendix, p. 6a):

> ". . . the Supreme Court's decision in *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U. S. 390, is not decisive of this case. There the Supreme Court held that an action for treble damages under the anti-trust laws was not an action for a penalty within the meaning of the federal statute of limitations for penal suits. But the word 'penalty' in a federal statute has a different meaning than the same word in the New York statute. The federal statute of limitations for penal actions applies only to actions on behalf of the United States and *qui tam* actions. *Huntington* v. *Attrill*, 146 U. S. 657, 668, 673. The New York three year statute by its express terms applies to actions 'by the person aggrieved' and thus, unlike the federal statute, applies to private actions. *Huntington* v. *Attrill*, *supra*, 146 U. S. 677-678."

The decision of this Court in the *Chattanooga Foundry* case that the Tennessee penalty statute is inapplicable does not advance plaintiff's contentions. That holding was based solely upon an application of Tennessee law. With respect to

that aspect of the *Chattanooga Foundry* case, this Court said (203 U. S. 390, 397-98):

> "Thus we come to the main question of the case, namely, *which limitation under the laws of Tennessee is applicable, the matter being left to the local law by the silence of the Statutes of the United States.* Rev. Stat. § 721 [The Rules of Decision Act]; *Campbell* v. *Haverhill*, 155 U. S. 610. * * * The Circuit Court of Appeals held that the case did not fall within 2772 or 2773, but only within 2776, and therefore was not barred. Although the decision is appealed from, *as this question involves the construction of local law* we cannot but attribute weight to the opinion of the judge who rendered the judgment, *in view of his experience upon the Supreme Court of Tennessee.* And although doubts were raised by the argument, we have come to agree with *his* interpretation in the main." [Emphasis supplied.]

We submit that under New York law the application of the New York three-year "penalty" statute turns upon the question whether the treble damage provision was included in the antitrust laws as punishment for infraction of a public law. It is clear, both from the legislative history of the Act and the many decisions of this Court, that Section 4 was, indeed, enacted for that purpose. Under applicable New York state law, therefore, the three-year statute applies. The court below should have directed that this action be dismissed as barred by the New York statute of limitations. The Court of Appeals for the Second Circuit has decided an important state question in a way conflicting with applicable state law. This Court should issue a writ of certiorari to review this serious error.

We do not suggest here that there is any conflict among the Circuits in interpreting a purely federal question arising under the antitrust laws. We do urge, however, that there is a sharp difference of opinion among the Circuits in applying virtually

identical state statutes of limitations to this federally-created cause of action. The importance of this question, which has not been, but should be settled by this Court is seen in the fact that the court below granted an interlocutory appeal in this case and that the Third and Fourth Circuits within the past few weeks have granted interlocutory appeals to settle the question with respect to the Pennsylvania and North Carolina statutes.*

The issue raised by this petition is of importance not only in the decision of this case but is directly involved in at least nine antitrust treble damage actions now pending in the Southern and Eastern Districts of New York and in one case in the Western District of North Carolina (where the New York statute applies). We set forth as Exhibit A to this petition a list which shows the names of the cases involved, the courts in which such cases are pending, and the aggregate damages sought in each. The *ad damnum* clauses in those cases aggregate well over forty million dollars ($40,000,000.) before trebling. In each of those cases, a holding that the three-year statute of limitations applies will either substantially limit liability or materially shorten the trial or both.

*On November 5, 1959, the Court of Appeals for the Third Circuit granted an appeal with respect to the Pennsylvania statute in *Shapiro, et al.* v. *Paramount Film Distributing Corporation*, a case filed in the Eastern District of Pennsylvania on January 4, 1956, shortly before the applicable date of the federal four-year statute of limitations. On October 13, 1959, the Fourth Circuit granted an appeal with respect to the North Carolina statute in *Thompson* v. *North Carolina Theatres, Inc.*, a case pending in the Western District of that state.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

FREDERICK W. R. PRIDE,
Attorney for Petitioner,
National Theatres Corporation
100 Broadway
New York 5, New York

JOHN F. CASKEY,
CHARLES F. YOUNG,
STANLEY GODOFSKY,
Of Counsel.

November 19, 1959.

EXHIBIT A

Name of Case	Damages Claimed in Complaint Before Trebling
Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., et al. (Civil Action No. 96-334, S. D. N. Y.)	$ 360,000.
Skouras Theatres Corporation et al. v. Radio-Keith-Orpheum Corporation, et al. (Civil Action No. 85-258, S. D. N. Y.)	29,230,000.
Broadway & Ninety-Sixth Street Realty Company, et al. v. Loew's Incorporated, et al. (Civil Action No. 85-239, S. D. N. Y.)	4,774,432.
Vilastor Kent Theatre Corp., et ano. v. Harry Brandt, et al. (Civil Action No. 90-65, S. D. N. Y.)	390,000.
Miami Drive In Theatre, Inc. v. Paramount Pictures Corporation, et al. (Civil Action No. 106-94, S. D. N. Y.)	Unspecified
Banana Distributors, et al. v. United Fruit Company, et al. (Civil Action No. 87-361, S. D. N. Y.)	2,708,279.
Independent Productions Corp. et ano. v. Loew's Incorporated (Civil Action No. 110-304, S. D. N. Y.)	2,500,000.
Julius Nagler, et al. v. Admiral Corporation, et al. (Civil Action No. 106-115, S. D. N. Y.)	Unspecified.
G. K. W., Inc., et al. v. Warren-Connelly Company, Inc., et al. (Civil Action No. 101-346, S. D. N. Y.)	Unspecified.
Court De Graw Theatre, Inc. v. Loew's Incorporated (Civil Action No. 12921, E. D. N. Y.)	210,000.
Carver Theatre, Inc. v. Paramount Pictures, Inc., et al. (Civil Action No. 1008, W. D. N. C.)	750,000.

APPENDIX

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 288—October Term, 1958.

(Argued May 12, 1958 Decided August 24, 1959.)

Docket No. 25485

BERTHA BUILDING CORPORATION,
Plaintiff-Appellee,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellant.

Before:

SWAN, HINCKS and MOORE,
Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Hon. Joseph C. Zavatt, *Judge*, which denied defendant's motion for summary judgment. Affirmed.

ROYALL, KOEGEL, HARRIS & CASKEY, *Attorneys for Defendant-Appellant.* John F. Caskey, Frederick W. R. Pride and Charles F. Young, of Counsel.

CORCORAN, KOSTELANETZ, GLADSTONE & LOWELL, *Attorneys for Plaintiff-Appellee.* Boris Kostelanetz and Nick C. Spanos, of Counsel.

SWAN, *Circuit Judge*:

National Theatres Corporation has appealed from an order which denied its motion for summary judgment in this action for treble damages under section 4 of the Clayton Act, 15 U. S. C. A. § 15. The motion was based on the ground that the New York three year statute of limitations, prescribed by § 49(3) of the Civil Practice Act, barred the action. Without reaching the merits of the motion, Judge Zavatt denied it on the theory that defendant was precluded from relying on the three year statute by the doctrine of "the law of the case." His opinion is reported in 166 F. Supp. 805. Leave to appeal was granted under the Interlocutory Appeals Act, 28 U. S. C. A. § 1292(b).

For an understanding of the matters to be subsequently discussed, it is desirable to give a brief statement of what had occurred in the case prior to the making of defendant's motion for summary judgment.

The complaint was filed in the court below on September 5, 1951. It alleged that plaintiff is a California corporation which owned and operated a theatre in Los Angeles until forced to dispose of it by reason of violations by defendant of the anti-trust laws. Concededly plaintiff's alleged cause of action arose in California and accrued no later than July 4, 1935—more than 16 years before the present action was commenced. Defendant's answer, filed December 26, 1951, pleaded three statutes of limitations: (1) The California three year statute, made applicable by New York's "borrowing statute," § 13 of the Civil Practice Act; (2) the New York three year statute, applicable to "An action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved * * *," § 49(3) of the Civil Practice Act; and (3) the New York six year statute, applicable to "An action to recover upon a liability created by statute, except a penalty or forfeiture," § 48(2) of the Civil Practice Act.

In December 1955 a separate trial of defendant's limitation defenses in this case and in the companion case of *Gumbiner Theatrical Enterprises, Inc.* v. *National Theatres Corporation,* was had before Judge Galston. In a brief submitted to him defendant stated: "If this court finds, as we believe it must, that the substantial and continuous business activities of National in California made it amenable to suit there, the three-year California statute is applicable by virtue of section 13 of the New York Civil Practice Act. Both claims would then be barred by the California statute without consideration of the questions whether the New York statute is six years or three years,* or whether the institution of *United States v. Paramount* on July 20, 1938, operated to toll the New York statute during some or all of the time it was pending." It was in this setting that there was submitted to and adopted by Judge Galston the following conclusion of law:

> "Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years, Civil Practice Act of New York, Section 48."

However, his decision was that the California three year statute barred the actions. Accordingly he dismissed the complaints. His opinion is reported in 140 F. Supp. 909. On appeal this court reversed and remanded in the case of *Bertha Building Corporation* on the ground that the plaintiff was entitled to a jury trial of the issue raised by defendant's plea of the California statute, namely, whether defendant was suable there. *Bertha Building Corp.* v. *National Theatres Corp.*, 248 F. 2d 833, 836, 841, cert. den. 356 U. S. 936. On the appeal the defendant did not urge the applicability

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*"We concede that the cases seem to hold that the New York statute is six years * * *"

of the New York three year statute. It was after the remand that defendant moved for summary judgment.

We agree with appellant that the doctrine of "the law of the case" does not preclude consideration of the merits of the motion. That doctrine was discussed at length in *Dictograph Products Company* v. *Sonotone Corporation*, 2 Cir. 230 F. 2d 131, and the rigidity of the rule expressed in *Commercial Union of America* v. *Anglo-South American Bank*, 2 Cir. 10 F. 2d 937 was expressly overruled. As explained in the *Dictograph* case, even when an issue has been decided by a district judge, another judge of the same court may nevertheless come to a different conclusion. Since Judge Galston decided that the California statute was a bar, he had no need to consider whether the three year or six year New York statute was applicable in the case of *Bertha Building Corporation*, and appellant's concession before him that the six year statute applied should not be regarded as conclusive in the motion subsequently brought on before Judge Zavatt. However, the doctrine of the law of the case, in the sense discussed in the *Dictograph* opinion, does not really fit these circumstances. The question is not one of overruling an earlier decision by another judge of the same court.

The question presented is really whether defendant is precluded by waiver and estoppel from contending that the action is barred by the three year New York statute of limitations. This question involves the public policy against piecemeal litigation and the timeliness of the motion. The problem is sometimes described as governed by "the law of the case." It was so described in *Sorensen* v. *Pyrate Corporation*, 9 Cir. 65 F. 2d 982, 984-5. Judge Zavatt cited that case in support of his conclusion that "The defendant should not now be permitted to ground a motion for summary judgment upon a contention which might have been presented, and which is contrary to its concession upon the trial and the appeal." The *Sorensen* case is distinguishable. There, after trial on the

merits and an appeal, in which the judgment was reversed and the cause remanded for determination of the plaintiff's damages, the defendant tried to plead that the contract was void because of the plaintiff's fraud—a defense which might have been raised when the case was tried on the merits. The court held that the law of the case precluded the tardy presentation of such factual defense. Here, defendant's motion raises a question of law only which, if sustained, would prevent the necessity of a jury trial on the suability of defendant in California as well as any litigation on the merits of plaintiff's cause. Under the particular circumstances of this case, we do not think that the defendant should be estopped. Cf. *Emich* v. *General Motors Corp.*, 7 Cir., 229 F. 2d 714, 718. Plaintiff has cited no authority for estopping a party from raising a question of law under such circumstances.

We now pass to a consideration of the merits of the motion. The present federal statute of limitations, 15 U. S. C. A. § 15(b), is not applicable because it was enacted several years after the present action was brought. In the absence of an applicable federal statute of limitations, federal courts look to the statute of the forum.[1] Hence we must ascertain whether, if it shall be found that the three year California statute has been tolled,* the six year or three year New York statute applies to plaintiff's federally created cause of action. The choice of the appropriate New York statute turns on an interplay of federal and state law. Whether the three year or six year statute is to be applied by the federal court, the latter must accept the statutes as construed and interpreted by the New York courts. It is for them to determine what is meant by the word "penalty" in the three year statute. But the purposes

[1] *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397; *Cope* v. *Anderson*, 331 U. S. 461, 463.

*Unless it shall be found that the California statute has been tolled, it will be applicable under the New York borrowing statute and whether the three year or six year New York statute would otherwise be applicable will become moot for purposes of this case.

attributable to the federal anti-trust laws must be governed by federal law. Accordingly, to determine whether a suit for treble damages under section 4 of the Clayton Act has the characteristics of actions encompassed by the three year New York statute federal decisions must be examined. The problem was well stated by Judge Ryan in *Leonia Amusement Corp. v. Loew's Inc.* (S. D. N. Y.), 117 F. Supp. 747 at 752.[2] See also *Rawlings v. Ray*, 312 U. S. 96, 98.

Considered in the light of these principles, the Supreme Court's decision in *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U. S. 390, is not decisive of this case. There the Supreme Court held that an action for treble damages under the anti-trust laws was not an action for a penalty within the meaning of the federal statute of limitations for penal suits.[3] But the word "penalty" in a federal statute has a different meaning than the same word in the New York statute. The federal statute of limitations for penal actions applies only to actions on behalf of the United States and *qui tam* actions. *Huntington v. Attrill*, 146 U. S. 657, 668, 673. The New York three year statute by its express terms applies to actions "by the person aggrieved" and thus, unlike the federal statute, applies to private actions. *Huntington v. Attrill*, 146, *supra*, 677-78.

After an extensive review of New York decisions, Judge Ryan concluded that the New York three year statute did not apply to private suits for damages which are exemplary in

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[2] The problem, therefore, is two-fold. (a) what in federal law is the essential nature of a claim arising under Section 4 of the Clayton Act as amended [15 U. S. C. A. § 15]; and (b) what New York statute of limitations would the New York courts hold applicable to this type or class of claim."

[3] At the time of the *Chattanooga* decision section 1047 of the Rev. Stat. provided a five year limitation on any "suit for a penalty or forfeiture * * * accruing under the law of the United States." That limitation is now embodied in 28 U. S. C. A. § 2462 which applies to "an action * * * for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise."

part but not wholly unrelated to actual loss. Accordingly, he held on the basis of appropriate federal decisions, that the six year New York statute and not its three year statute was applicable to an action for treble damages under the anti-trust laws. Four years later in *Banana Distributors* v. *United Fruit Company* (D. C. S. D. N. Y.), 158 F. Supp. 160, after a thorough review of authorities, Judge Levet concluded that the three year statute should be applied.[4]

Both this appeal and the appeal in *Banana Distributors* have been ably argued with extensive citation of authorities. We have examined these cases but do not find it necessary here to discuss them. Whatever doubt might have been entertained prior to the Court of Appeals decision in *Sicolo* v. *Prudential Savings Bank of Brooklyn*, 5 N. Y. 2d 254, decided subsequent to Judge Levet's decision, that decision makes it plain that *Leonia* correctly anticipated the trend of New York law. Sicolo, a member of the New York City Fire Department, was injured on December 23, 1951 while helping to put out a fire in a building owned by the Prudential Savings Bank of Brooklyn. More than four years after the accident he filed an amended complaint based on § 205a of the General Municipal Law. That statute provides, in substance that the injured fireman was entitled to recover his actual damages, but in no event less than $1,000., regardless of actual loss.[5] The defendant

[4] This case is pending on appeal and the decision therein will be handed down herewith.

[5] So far as material this section provided:

> "* * * in the event any accident, causing injury * * *, occurs directly or indirectly as a result of any neglect, omission, wilful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments * * *, the person or persons guilty of said neglect * * * shall be liable to pay any officer, member, agent or employee of a fire department injured * * * while in the discharge or performance of any duty imposed by the * * * superior officer of the fire department

moved to dismiss the action because it was not begun within three years from the accrual of the action. The Court of Appeals said that the question for decision was whether the three year limitation of § 49(3) of the Civil Practice Act or the six year limitation of § 48(2) was applicable. After reviewing numerous authorities, both state and federal, it held that the action was not one for a "penalty or forfeiture" and that the six year statute applied. The views expressed therein and the treatment of the cases cited make it plain that the New York Court of Appeals does not regard actions for civil damages which are made exemplary in part only, as falling within § 49(3). A suit for treble damages under the anti-trust laws is plainly of this character.

Accordingly, the six year and not the three year New York statute is applicable to anti-trust actions brought in a federal court sitting in New York, at least unless under New York's "borrowing statute" a shorter period of limitations is applicable under the law of the State where the cause of action arose. The denial of the motion for summary judgment was correct and the order is affirmed on this ground.

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* * * not less than one thousand dollars * * * such liability to be determined and such sums recovered in an action by any person injured * * * as aforesaid."

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BERTHA BUILDING CORPORATION, *Plaintiff* —*against*— NATIONAL THEATRES CORPORATION, *Defendant*	Civil No. 12073. October 15, 1958

APPEARANCES:

CORCORAN, KOSTELANETZ & GLADSTONE
Attorneys for Plaintiff
Nick C. Spanos
Francis J. Mulderig
Of Counsel

ROYALL, KOEGEL, HARRIS & CASKEY
Attorneys for Defendant
Frederick W. R. Pride
John F. Caskey
Charles F. Young
Of Counsel

ZAVATT, *D. J.*

This is a civil anti trust action instituted in this Court by a California corporation upon an alleged cause of action, which, the plaintiff concedes, accrued in California no later than July 4, 1935. The complaint was not filed until September 5, 1951. The plaintiff pleaded the following statutes of limitations as being pertinent herein:

(1) Section 48 of the New York Civil Practice Act, providing:

"§ 48. *Actions to be commenced within six years.* The following actions must be commenced within six years after the cause of action has accrued:

* * *

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

(2) Section 19 of the New York Civil Practice Act, providing:

"§ 19. *Effect of defendant's absence from state or residence under false name.* If, when the cause of action accrues against a person he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. * * * But this section does not apply in either of the following cases:

* * *

"2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served."

(3) Section 13 of the New York Civil Practice Act, providing:

"§ 13. *Limitation where cause of action arises outside of the state.* Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon such cause of action. * * *"

(4) Paragraphs 335 and 338 of the Code of Civil Procedure of the State of California, providing, as set forth in the complaint:

"Paragraph 335) PERIODS OF LIMITATION PRESCRIBED: The periods prescribed for the commencement of

actions other than for the recovery of real property, are as follows:

* * *

"Paragraph 338. (WITHIN THREE YEARS). Within three (3) years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

(5) Paragraph 351 of the Code of Civil Procedure of the State of California, providing, as set forth in the complaint:

"Paragraph 351. EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the time herein limited, after his return to the state and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

The plaintiff alleged that the defendant was not amenable to suit in California since the accrual of the cause of action, and that the defendant was without the State of New York at all times since the accrual of the cause of action; and, prior to December 16, 1949, did not have one or more officers within the State of New York, nor did it designate a resident of the State of New York upon whom a summons may have been served. The complaint further alleged that on or about July 20, 1938, the United States of America filed a petition in equity under the anti-trust laws of the United States in the United States District Court for the Southern District of New York (hereafter referred to as the *Paramount* action) against the defendant and others to enjoin and restrain the acts complained of in the instant action. It was alleged that the *Paramount* action was still pending against the defendant at the time of the filing of the complaint in the instant action, and that the running of the statute of limitations in respect of the instant cause of action was suspended during the pendency of the

Paramount action by virtue of Title 15, United States Code, Section 16, which provided at the time of the filing of the complaint:

> "* * * Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

The defendant's answer set up the following as affirmative defenses:

> "THIRD SEPARATE AND AFFIRMATIVE DEFENSE
>
> "Plaintiff's claim, if any, is barred by Section 13 of the New York Civil Practice Act and the statutes of limitations of the State of California.
>
> "FOURTH SEPARATE AND AFFIRMATIVE DEFENSE
>
> "Plaintiff's claim, if any, is barred by Sections 48 and 49 of the New York Civil Practice Act."

Section 49 of the New York Civil Practice Act provides:

> "§ 49. *Actions to be commenced within three years.* The following actions must be commenced within three years after the cause of action has accrued:
>
> * * *
>
> "3. An action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved or to that person and the people of the state, except where the statute imposing it prescribes a different limitation."

At this point it may be noted that the defendant pleaded in effect, that this action, having accrued no later than July 4, 1935 and having been commenced on September 5, 1951, was barred both under the California three-year statute of limitations and the New York three-year and six-year statutes

of limitations. The plaintiff, on the other hand, contended that the California statute was tolled by reason of the claimed fact that the defendant was not amenable to suit therein and that the New York six-year statute, allegedly applicable herein, was tolled by reason of the defendant not having been amenable to suit in New York prior to December 16, 1949.

On the day this action was commenced a civil anti-trust action was instituted against this same defendant by Gumbiner Theatrical Enterprises, Inc. (Civil Number 12074 in this Court). The *Gumbiner* cause of action, which arose in California no later than December 8, 1931, was grounded upon the same acts of the defendant and others which are set forth in the instant complaint and the pleadings in *Gumbiner* raised the same issues respecting the statutes of limitations of California and New York as did the pleadings in the instant action.

On July 3, 1953, the plaintiffs in both *Gumbiner* and the instant case moved for orders "directing that the issues concerning the defense of the Statute of Limitations, contained in defendant's answer" be tried separately by Court and jury. On the argument of the motions the defendant consented to a separate trial of the statute of limitations issues, but consented only to a trial by the Court without a jury. On June 25, 1954, orders were entered directing that the defenses of the statute of limitations contained in defendant's answers be tried separately to the Court without a jury and, thereafter, *Gumbiner* and the instant case were consolidated for the purpose of the trial of these issues. A trial of said issues was conducted by my illustrious predecessor, Judge Galston, on July 12, 13, 14, 15 and 16, 1955.

On the trial the defendant submitted two printed briefs to Judge Galston, one captioned "Separate Brief of National Theatres Corporation In Support Of Its Motion For Judgment On The Pleadings Disinissing The Complaints As Barred As A Matter Of Law By The Statute Of Limitations Of California," and a second captioned "Brief Of National

Theatres Corporation In Support Of Its Defenses That The Claims In Both Cases Are Barred By The Statutes Of Limitations." In the former brief the defendant recognized that there was a question in this case as to whether the applicable New York statute of limitations was three years or six years, but did not see fit to take a position on the question. (Of course, the fact that the defendant pleaded both New York statutes in its answer charges it with an appreciation of the problem involved at that early date.) In the latter brief the defendant maintained what was consistently its position at the trial, i.e., that both the *Gumbiner* case and the instant case were barred by the California three-year statute of limitations regardless of whether the New York statute was three years or six years. However, in this brief the defendant did "concede that the cases seem to hold that the New York statute is six years," while claiming that "Recent decisions of the Supreme Court, however, cast considerable doubt on the correctness of that view." The citations of authority by the defendant indicate that by this stage of the action its counsel had studied the problem of whether a civil anti-trust action fell within the New York three-year or six-year statute of limitations.

At the trial defendant's counsel clearly stated his position as to the New York statute under which he believed himself to be operating:

> "So that my whole position may be clear here in the development of the evidence, of course we will endeavor to show that National was doing business in both New York and California at the same time. In other words, if by any chance it could be held that the California statute was not applicable, the New York statute of six years would be applicable. In other words, they will have to show both that it was tolled in California and in New York." (Transcript of record, p. 46)

And in the "Brief of Defendant After Trial," defendant's counsel were concerned with a showing that the six-year New

York statute of limitations barred the *Gumbiner* action and the instant action, regardless of whether the California statute had been tolled by reason of the defendant's absence from that State. Upon the termination of the trial the defendant submitted the following proposed conclusion of law:

> "2. Plaintiffs and defendant concede for the purposes of these cases, and the Court concludes that the statute of limitations of New York, where these actions were instituted, is six years. Civil Practice Act of the State of New York, Section 48."

Judge Galston, finding that the actions were commenced prior to the effective date of the four-year federal statute of limitations, 15 U. S. C. A. § 15b, note, held that the applicable statute of limitations was to be determined by reference to the law of the state in which the action was pending. He held that the entire New York statute of limitations was to be applied, including the borrowing provisions relating to causes of action accruing in foreign jurisdictions contained in Section 13 of the New York Civil Practice Act. Judge Galston found that the applicable California statute of limitations was three years and that therefore the causes of action in the instant action were barred as of July 4, 1938, and in *Gumbiner* as of December 8, 1934, unless the California statute was tolled. On this issue Judge Galston found that the defendant was amenable to suit in California under the anti-trust laws during the period of limitations, and that as a result thereof both actions were barred.

Judge Galston's second conclusion of law is a verbatim adoption of the defendant's second proposed conclusion of law, to wit:

> "2. Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years. Civil Practice Act of the State of New York, Section 48."

Judge Galston further found and concluded that the defendant could have been sued in New York in an anti-trust case continuously throughout the period involved, and that the *Gumbiner* claim was barred by the New York statute of limitations. He stated, inter-alia:

> "* * * If National could have ben sued in New York in an anti-trust case for any period of six years prior to July 20, 1938, the [Gumbiner] action would also be barred by the New York Statute of Limitations, regardless of whether barred in California . . ." (Conclusion of Law Number 5; see Finding of Fact Number 50.)

The defendant has heretofore correctly characterized this as an unequivocal holding that the *Gumbiner* claim was barred in New York. (See Brief For The Respondent in Opposition to Petition For Writ of Certiorari in *Gumbiner* case.)

As a result of finding that the instant action was barred under the California three-year statute, and that the *Gumbiner* action was barred under both the California statute and the New York six-year statute, it was unnecessary for Judge Galston to determine the tolling effect, if any, of the *Paramount* action. On April 16, 1956, orders were entered dismissing the complaints in both actions.

The plaintiffs in both cases appealed to the Court of Appeals and the appeals were heard together on one record. (See Brief For the Respondent in Opposition to Petition For Writ of Certiorari in *Gumbiner*, footnote, p. 2.) In its brief in the Court of Appeals the defendant again made the point that the *Gumbiner* claim was barred by the California three-year statute of limitations if the defendant could have been sued in California under the anti-trust laws for any period of three years prior to the institution of the *Paramount* action, and that "That action likewise was barred by the New York statute of limitations if National could have been sued in

New York for any period of six years prior to July 20, 1938." But as to the instant claim, which was not pending for six years prior to the commencement of the *Paramount* action, it was argued only that the bar of the California three-year statute applied. (Defendant-Appellee's Brief in the Court of Appeals, pp. 3-4.) The Court of Appeals in its initial decision rendered September 10, 1957, reversed the judgments in both cases upon the ground that it was erroneous to refer the statute of limitations issue to Judge Galston for trial without a jury.

The defendant thereupon petitioned for rehearing, urging as a principal point in its brief that the *Gumbiner* action was barred by the New York six-year statute of limitations. The defendant emphasized the fact, conceded by the plaintiff in its principal brief in the Court of Appeals, that "In the Gumbiner action, on the other hand, the applicability of the New York as well as the California limitations' period is at issue." (Petition for Rehearing in the Court of Appeals, pp. 13-15.) It had been the plaintiff's position that the instant cause "was brought well within the six-year period of limitation prescribed by the New York Statute, in view of the suspension of the running of the Statute of Limitations effected by the filing and pendency of the *Paramount* case," and that therefore, "The only issue in the Bertha case is, accordingly, whether the three-year California period of limitations had run or been tolled prior to the institution of the *Paramount* action on July 20, 1938. In the Gumbiner action, on the other hand, the applicability of the New York as well as the California limitations' period is at issue." (Plaintiff-Appellant's Brief in the Court of Appeals, p. 5.) There can be no question but that this was the defendant's position as well at this stage of the proceeding.

On rehearing, the Court of Appeals on November 7, 1957 affirmed the judgment in the *Gumbiner* case, stating:

> ". . . A careful review of the evidence before Judge Galston on the question of whether the New York statute was tolled has convinced us that, if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue. Even though the jury might have disbelieved every one of the defendant's witnesses, the documentary evidence recited in Judge Galston's findings was overwhelming. . . ." 248 F. 2d 833, 841.

As to the instant cause the Court of Appeals stated, 248 F. 2d 833, 840:

> ". . . The Bertha cause of action arose in 1935 which was within six years of the Paramount action. *United States* v. *Paramount Pictures*, D. C., 85 F. Supp. 881. Thus as to Bertha the six-year New York statute, Civil Practice Act, § 48(2), could not possibly have run and the crucial question was whether the three-year California statute had run; as we correctly stated in the opening paragraph of our original opinion. . . ."

But as to *Gumbiner*, on the other hand, the Court of Appeals stated, *Ibid.*:

> ". . . However, in the Gumbiner case there was another question, equally crucial, viz., whether the New York statute of limitations had run. For the Gumbiner cause of action accrued on December 8, 1931. Thus if the New York statute was not tolled by National's absence, the Gumbiner action was barred here in December, 1937. Section 13 of the New York Civil Practice Act is alternative in operation: if the statute has run either in California or in New York the suit is barred here."

The Court of Appeals adhered to its initial decision reversing the judgment in the instant action for trial by jury on the limitations question. A petition for writ of certiorari to review said decision was denied on April 28, 1958, 78 S. Ct. 777.

On July 14, 1958, the defendant filed the instant motion for summary judgment dismissing the complaint herein on the sole ground that it is barred by the New York three year statute of limitations as contained in Section 49(3) of the Civil Practice Act, set forth above.

Upon a careful review of the proceedings heretofore had in this case, it is clear to the Court that it has been firmly established that Section 48(2) of the New York Civil Practice Act is the governing statute of limitations herein, that the pertinent period of limitations is six years, and that the defendant should be foreclosed by the application of the principle of the law of the case from now contending that the three-year New York statute of limitations applies. The following considerations support this conclusion:

1. The issue presented by the instant motion has been in this case from the time the defendant filed its answer. It was necessarily a part of the defense referred to Judge Galston for separate trial. Until this time the defendant has conceded that the relevant period of limitations is six years. Judge Galston may or may not have relied upon this concession in concluding that the six year statute applied. It would be reasonable to infer that he did not. Cf., *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364 (D. C. E. D. N. Y. 1939). In any event, the defendant should be precluded from belatedly advancing a position contrary to its repeated concession which may have influenced the course of a trial involving more than 560 pages of reported testimony and 51 exhibits, the decision upon appeal and rehearing in the Court of Appeals, and the disposition of a petition to the Supreme Court for a writ of certiorari.

2. Judge Galston specifically concluded that the six-year statute applied. There is no question but that the issue which the defendant now attempts to raise was properly presentable

to him. It was a part of the pleadings and a part of the order of reference for trial. It may be generally stated that the ruling of one judge ordinarily becomes the law of the case in that Court, and that a judge should not ordinarily review or disturb the rulings of another judge of the same or a co-ordinate Court in the same case. *In re Hines*, 88 F. 2d 423 (2nd Cir. 1937); *Commercial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. 2d 937 (2nd Cir. 1925); *Cuba R. Co.* v. *United States*, 135 F. Supp. 847 (D. C. S. D. N. Y. 1955); *North American Philips Co., Inc.* v. *Brownshield*, 111 F. Supp. 762 (D. C. S. D. N. Y. 1955); *Aachen & Munich Fire Ins. Co.* v. *Guaranty Trust Co. of New York*, 24 F. 2d 465 (D. C. S. D. N. Y. 1927), reversed on other grounds, 27 F. 2d 674 (2nd Cir. 1928); *Farmers Loan & Trust Co.* v. *Miller*, 298 Fed. 758 (D. C. S. D. N. Y. 1924), reversed on other grounds, *Farmers Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848 (2nd Cir. 1925). In *Hines*, a case in which a second Judge decided a point which was already pending undecided in a separate proceeding in the same case, the Court of Appeals stated:

> ". . . It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case. The law enunciated by the first judge is not merely his individual opinion; it is the law of the District Court, to be followed upon similar facts, until a different rule is laid down by a court of superior jurisdiction. . . . Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges. . . ." 88 F. 2d 423, 425.

In *Commercial Union*, the Court of Appeals reversed the judgment from which the appeal was taken, on the sole ground that it was the result of one judge overruling the decision of another judge of co-ordinate jurisdiction. To the extent that *Commercial Union* must be read as meaning that the question is not one of discretion, and that on no occasion may the

second judge reconsider a ruling of the first judge," it has been overruled by *Dictograph Products Co., Inc.* v. *Sonotone Corporation*, 230 F. 2d 131, 136 (2nd Cir. 1956). And, to be sure, the law of the case does not extend to the reasons given by an earlier judge for actions taken by him, nor bind a later judge to follow such reasoning in the subsequent disposition of the case. *Potts* v. *Village of Haverstraw*, 93 F. 2d 506 (2nd Cir. 1937); *Munro* v. *Post*, 102 F. 2d 686 (2nd Cir. 1939). We are dealing here not merely with an element of reasoning employed by Judge Galston in reaching an eventual judgment, but rather with the actual disposition of what now proves to be a vital issue properly before Judge Galston for determination.

In the view I take of this matter it is of no moment that such disposition may have been grounded upon a concession by the defendant. Had the defendant's present contention been argued with the same vigor before Judge Galston and before the Court of Appeals, it cannot be said whether it would or would not have been sustained. In any event there would have been a definitive disposition of the question of law which the defendant now attempts to raise, and both counsel and the Court would have been spared the rigors of the instant motion. The defendant should not now be permitted to ground a motion for summary judgment upon a contention which might have been presented, and which is contrary to its concession upon the trial and the appeal. See *Sorenson* v. *Pyrate Corporation*, 65 F. 2d 982 (9th Cir. 1933).

The defendant may not say that it was "abundantly clear . . . that National was amenable to suit in California and thus it mattered little at the trial whether the applicable New York statute was six years or three years." (Affidavit of Charles F. Young, Esq., July 14, 1958, p. 3.) This statement belies the conclusion of the Court of Appeals that it was clear as a matter of law only that the defendant was amenable to suit in New York. It was thus of controlling importance upon the

trial and appeal whether the three-year or six-year statute applied. In the light of the eventual disposition of *Gumbiner*, a conclusion that the three-year New York statute applied in the instant case would have been completely dispositive hereof.

The attorneys for the defendant have been vigilant to seize upon and to exploit thoroughly the points of law which have been favorable to them throughout the course of this action. It stretches credulity to think that they would have voluntarily and eagerly placed all their eggs in one basket in conceding that the New York six-year statute applied. This they would now have the Court believe. The contention is negated by two principal points: (a) The defendant argued in its Brief After Trial before Judge Galston that the instant action was barred even under the New York six-year statute. (b) The defendant's attack in *Gumbiner* was persistently aimed at showing that that cause was barred under both the California and New York statutes. It is pointless to think that the defendant would have maintained such a position in *Gumbiner* and at the same time would have relied solely on the bar of the California statute in this action. As stated by the defendant in its brief in opposition to the petition for writ of certiorari in *Gumbiner*:

> "All of the stock of the petitioner here and the respondent Bertha Building Corporation in No. 761 was owned by one H. L. Gumbiner. The complaints in the two actions were filed on the same day and the actions were consolidated for the trial of defendant's statute of limitations defense. The respondent here is the petitioner in No. 761 and it was the only defendant in each case, the statute of limitations being an admitted bar as to all the alleged co-conspirators. The issues tried below were whether National Theatres Corporation could have been sued in California for three years or in New York for six years after the cause of action accrued. The District Court dismissed both complaint as barred by the three-year California statute. It also held that the complaint of the petitioner

> Gumbiner Theatrical Enterprises was barred by the six-year New York statute and should be dismissed for that reason as well. Plaintiffs in both cases appealed to the court below and the appeals were heard together on one record * * *" (Footnote, pp. 1-2.)

Such being the relationship between the two cases the positions taken and the determination reached in *Gumbiner* may properly be examined in evaluating the situation in the case at bar.

3. The ultimate disposition on rehearing by the Court of Appeals in the instant case and in *Gumbiner* may only be rationalized with a holding by that Court that the six-year New York statute of limitations applies herein. That being so, such a holding must be regarded as an adjudication of that issue for the purposes of this case. The "law of the case" when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of a case, applies to everything decided, either expressly or by necessary implication. *Munro* v. *Post*, *supra*.

4. The current motion for summary judgment appears to have been inspired by the decision of Judge Levet in *Banana Distributors, Inc.* v. *United Fruit Co.*, 158 F. Supp. 160 (D. C. S. D. N. Y. 1957), applying the three-year New York statute of limitations in a case such as that at bar. This decision is in square conflict with the previous decision rendered in the same Court by Judge Ryan in *Leonia Amusement Corp.* v. *Loew's Inc.*, 117 F. Supp. 747 (D. C. S. D. N. Y. 1953), and is not regarded as a sufficient basis for the exercise of whatever discretion this Court might have to decline to follow what is believed to be the law of the case herein. While Judge Levet distinguished the initial decision by the Court of Appeals in the instant case in arriving at his conclusion that Section 49(3) of the New York Civil Practice Act governs this type of

case, it is not clear that Judge Levet had the decision of the Court of Appeals on rehearing before him (*Banana Distributors* was decided thirty-five days after the decision on rehearing in *Bertha*, but Judge Levet does not discuss the portions of the decision relied on herein), nor is it clear that Judge Levet would have pursued the same course if faced with the facts of the instant case.

The defendant's motion for summary judgment will be denied. Of course, nothing contained herein is to be construed as a determination *de novo* that the six-year statute of limitations is to be applied in cases of this nature, nor that I would apply the three-year statute of limitations if free to do so. Having determined that the law of the case is to be applied herein, I feel constrained to apply it, in this instance, without inquiry into the merits of the motion.

Settle order on notice.

JOSEPH C. ZAVATT
U. S. D. J.

PERTINENT STATUTES AND RULES

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 48(2) of the New York Civil Practice Act reads:

> "The following actions must be commenced within six years after the cause of action has accrued:
>
> * * *
>
> "2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

Section 49(3) of the New York Civil Practice Act reads as follows:

> "The following actions must be commenced within three years after the cause of action has accrued:
>
> * * *
>
> "3. An action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved, or to that person and the people of the state, except where the statute imposing it prescribes a different limitation."

Section 205-a of the New York General Municipal Law reads as follows:

> "In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which re-

sults in death, occurs directly or indirectly as a result of any neglect, omission, wilful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, wilful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs at law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than one thousand dollars, and in case of death not less than five thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid."

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 534

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF RESPONDENT IN OPPOSITION

BORIS KOSTELANETZ
52 Wall Street
New York 5, N. Y.
Attorney for Respondent

Of Counsel:

NICK C. SPANOS
15 West 10th St.
Kansas City 5, Mo.

EUGENE GRESSMAN
1701 K Street, N. W.
Washington 6, D. C.

January 14, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent respectfully submits that the petition for a writ of certiorari should be denied inasmuch as (a) the question presented relates only to a narrow and non-recurring problem of state law which was correctly resolved by the court below and (b) the judgment below is interlocutory in nature and creates no extraordinary situation warranting review by this Court at this juncture of the case.

(a) The correct resolution of the state law question

This action for treble damages under the federal antitrust laws was brought in a federal district court in New York. In the present posture of the case, the only question at issue is a determination of which limitations provision of the New York Civil Practice Act is applicable to this action—Section 48(2), the six-year statute relative to "a liability created by statute", or Section 49(3), the three-year statute respecting any "action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved." The Court of Appeals below, after a thorough examination of relevant New York authorities, concluded that on the facts of this case the six-year statute, Section 48(2), was the applicable one and hence that this action was not barred insofar as New York limitations law was concerned. 269 F. 2d 785.

In so holding, the Court of Appeals has rendered no decision warranting the invocation of this Court's discretionary review power. No question is raised as to whether state or federal limitations law should be applied. *Cf. Guaranty Trust Co. v. York*, 326 U. S. 99. Nor is any issue created as to whether the limitations law of New York rather than that of some other state is to be applied. *Cf. Wells v. Simonds Abrasive Co.*, 345 U. S. 514. Petitioner concedes, moreover, that there is no problem here concerning any "conflict among the Circuits in interpreting a purely federal question arising under the antitrust laws." Pet. 20.

All that the Court of Appeals has done here is to give the New York limitations statutes the same interpretation and effect that they would have received in the state courts of New York. The court below has manifested scrupulous deference to the relevant

New York statutes and the New York decisions interpreting those statutes; and it has displayed unmistakable care in applying those statutes in light of the particular facts of this case. Petitioner's only complaint is its assertion that the court "has decided an important state question in a way conflicting with applicable state law." Pet. 20. Such a claim, in the context of this case, completely ignores the settled rule of this Court that, in considering certiorari petitions, "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. See also *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534.

Petitioner's insistence that the Court of Appeals acted at variance with the law of New York is refuted by the most recent and relevant New York decision discussed in the opinion below, *Sicolo* v. *Prudential Savings Bank of Brooklyn*, 5 N. Y. 2d 254. The New York Court of Appeals in the *Sicolo* case held that a statutory cause of action for civil damages brought by a private individual—which is clearly the nature of a treble-damage action under the federal antitrust laws—is remedial rather than penal so as to render the six-year limitations provision of Section 48(2) applicable. Such has been the consistent view of the New York courts with reference to statutory actions for civil damages or compensation. See *Walsh* v. *515 Madison Ave. Corp.*, 181 Misc. 219, aff'd 293 N. Y. 826; *Drenne* v. *Mutual Life Ins. Co.*, 42 N. Y. Supp. 2d 259; *Corcoran* v. *Nelson-Towers Realty Corp.*, 42 N. Y. Supp. 2d 265; *Cox* v. *Lykes Brothers*, 237 N. Y. 376; *Schineck* v. *386 Fourth Ave. Corp.*, 182 Misc. 1038. Other fed-

eral courts applying New York limitations law have reached identical conclusions. *Leonia Amusement Corp.* v. *Loew's Inc.*, 117 F. Supp. 747 (S. D. N. Y.); *LaGuardia* v. *Austin-Bliss Tire Co.*, 41 F. Supp. 678 (S. D. N. Y.); *Asselta* v. *149 Madison Avenue Corp.*, 65 F. Supp. 385 (S. D. N. Y.), aff'd 156 F. 2d 139 (C. A. 2), aff'd 331 U. S. 199.

Petitioner's quarrel with the holding below stems from its mistaken belief that a treble damage action under the antitrust laws is designed primarily to punish the wrongdoer rather than to redress injuries suffered by the private plaintiff. No New York authorities directly relevant to such an interpretation of the antitrust laws are cited in the petition. And the general proposition that such an action for treble damages is in the nature of a penalty was long ago discarded by this Court in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, holding such an action to be non-penal so as to make inapplicable a federal limitations statute for penalties. See *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379-380, for a New York application of the *Chattanooga* ruling. More recently this Court in *Koller* v. *United States*, 359 U. S. 309, summarily affirmed a lower court opinion, *United States* v. *Doman*, 255 F. 2d 865 (C. A. 3), which had held that a civil suit for compensatory damages under the Surplus Property Act was not an action for a penalty within the meaning of the federal limitations statute relating to penalties.

The petition thus resolves itself into a mere effort to have this Court review the concurrent and correct determinations of the two courts below applying the pertinent New York limitations law. Moreover, the importance and the very existence of this problem of

applying state limitations statutes to suits under the federal antitrust laws are rapidly approaching the vanishing point. The instant case arose before 1955, the year when Congress amended the antitrust laws to provide a uniform federal limitations period of four years after the accrual of a treble damage cause of action. 69 Stat. 283, 15 U. S. C. A. § 16. Thus all actions accruing since the effective date of that amendment are no longer controlled by state statutes of limitations. The problem raised by this case will soon be of historic interest only.

Petitioner's claim (Pet. 21, Ex. A) that the issue raised by the petition affects at least nine other antitrust treble damage actions now pending does not serve to augment the importance of that issue. The court below, by its correct analysis of the New York law, has provided an authoritative guide for the resolution of the limitations issue in those nine other cases involving the New York law. Nothing further need be added by this Court.

(b) The interlocutory nature of the judgment

An indisputable fact at this posture of the case is the interlocutory nature of the judgment below. As set forth in the opinion below and in the petition, the case was remanded earlier from the Court of Appeals to the District Court for a jury trial on the issue of whether the action was barred by the California three-year statute of limitations. Petitioner thereupon filed a motion for summary judgment dismissing the complaint as barred by the three-year New York statute of limitations. The District Court denied the motion. Pet. 9a-24a. Leave to appeal was granted under the Interlocutory Appeals Act. 28 U. S. C. A. § 1292(b).

The Court of Appeals then affirmed the denial of the motion for summary judgment.

The judgment entered below is thus non-final in every sense of the word. It merely affirmed an interlocutory order of the District Court which in no way put an end to the case. And it is a judgment which is not prejudicial to a renewal of the point in issue once a final judgment against petitioner is rendered. See *Cohen* v. *Beneficial Loan Co.*, 337 U. S. 541, 546.

As this Court has stated, "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U. S. 323, 324-325. This factor of finality is likewise relevant to the issuance of a writ of certiorari. This Court "should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 384.

Petitioner has made no suggestion that denial of certiorari at this juncture would "practically defeat the right to any review at all" at a later date or that "extraordinary inconvenience and embarrassment in the conduct of the cause" would result. And the fact that the interlocutory order of the District Court was reviewed by the Court of Appeals pursuant to the Interlocutory Appeals Act gives the petition no greater weight. Nothing in that statute or its legislative history indicates any Congressional mandate to the Court to depart from the usual rule respecting review of in-

terlocutory orders. And where, as here, the judgment respecting the interlocutory order turns solely upon an interpretation and application of pertinent state law and raises no other issue of general importance no reason for granting the writ of certiorari is apparent.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BORIS KOSTELANETZ
52 Wall Street
New York 5, N. Y.
Attorney for Respondent

Of Counsel:

NICK C. SPANOS
15 West 10th St.
Kansas City 5, Mo.

EUGENE GRESSMAN
1701 K Street, N. W.
Washington 6, D. C.

January 14, 1960.

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No. 534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

NATIONAL THEATRES CORPORATION,
Petitioner,

v.

BERTHA BUILDING CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FREDERICK W. R. PRIDE,
Attorney for Petitioner,
National Theatres Corporation,
100 Broadway,
New York 5, New York

JOHN F. CASKEY,
CHARLES F. YOUNG,
STANLEY GODOFSKY,
Of Counsel.

January 20, 1960.

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The second reason why the respondent urges that a writ for certiorari to review the judgment of the Court of Appeals for the Second Circuit herein should not issue is the alleged interlocutory nature of the judgment below which is a judgment that the respondent's cause of action is not barred by the New York Three-Year Statute of Limitations (Section 49(3) New York Civil Practice Act.)

The rule requiring finality as a condition to review applies only to a review by a Court of Appeals of an order of the District Court (Section 1291, Title 28 U. S. C.) and has no application to a review by this Court of cases arising in the Court of Appeals (Section 1254(1), Title 28 U. S. C.). Historically, this Court has granted writs of certiorari when the decision of the lower court was interlocutory. *Farrington* v. *Tkushige*, 273 U. S. 284 (1927), *Cobbledick* v. *United States*, 308 U. S. 548 (1939); see *McCullough* v. *Cosgrave*, 309 U. S. 634 (1939) and *DeBeers Mines* v. *United States*, 325 U. S. 212 (1944).

This case fulfills the requirement of extraordinary circumstances because petitioner is asking this Court to pass on the question of the applicable statute of limitations to this action.

A determination by this Court that the action is covered by the New York Three-Year Statute of Limitations will avoid extended litigation by the parties on the numerous factual and legal issues presented by the case. *U. S. Alkali Ass'n* v. *U. S.*, 325 U. S. 195.

Moreover, this case arises under the newly enacted Interlocutory Appeals Act which permits, at the discretion of the district court and the Court of Appeals, a review by the Court of Appeals of an interlocutory order of the district court (28 U. S. C., Section 1294(b)).

When the district court has made the necessary certificate, and the Court of Appeals has granted leave for appeal, as here, it follows that this Court has the jurisdiction to review the determination of the Court of Appeals just as in any appeal to such an appellate court, and that its discretion to review the determination of the Court of Appeals should be exercised as in any other case. Appropriate grounds for such review are set forth with petition.

Respectfully submitted,

FREDERICK W. R. PRIDE,
Attorney for Petitioner,
National Theatres Corporation
100 Broadway,
New York 5, New York

JOHN F. CASKEY,
CHARLES F. YOUNG,
STANLEY GODOFSKY,
Of Counsel.

January 20, 1960.